

In the Matter of Merchant Mariner's Document No. Z-67420 and all
other Seaman Documents
Issued to: CHRIST WARRENT SCHWENK

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1464

CHRIST WARRENT SCHWENK

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 28 February 1964, an Examiner of the United States Coast Guard at San Francisco, California, suspended Appellant's seaman's documents for 8 months outright upon finding him guilty of misconduct. The specifications found proved allege that while serving as a junior engineer on board the United States SS PELICAN STATE under authority of the document above described, on or about 20 September 1963, Appellant wrongfully threatened another crew member with a knife, and wrongfully had liquor aboard the ship, and on 23, 24, and 25 September 1963, at sea, wrongfully failed to perform duties.

At the hearing, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence the testimony of the alleged victim of the threat and of the master of the ship, documentary evidence consisting of the ship's Official Log-Book and Shipping Articles, and a knife.

In defense, Appellant offered in evidence his own testimony and a medical report made at Sfax, Tunisia. The report is not germane to this appeal as it bore upon a specification found not proved.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and five specifications had been proved. The Examiner then served a written order on Appellant suspending all documents issued to him for a period of eight months. this included two months from a prior probationary order.

The entire decision was served on 4 March 1964. Appeal was

timely filed on 2 April 1964.

FINDINGS OF FACT

On 20 September 1963, Appellant was serving as a junior engineer on board the United States SS PELICAN STATE and acting under authority of his document while the ship was at sea.

One Peter Denis Callaghan, a wiper, a person with whom Appellant had previously had trouble, was in the crew's messroom, when a messman advised him that Appellant had said he was going to "stick a shiv" in Callaghan. Callaghan sat down and seconds later Appellant entered the room. (The ship had just sailed from Moji, Japan, and Appellant had been ashore all afternoon).

As Appellant sat on the edge of a chair about three feet from Callaghan, in a position from which he could have sprung forward, he opened the knife and held it out in front of him, pointed at Callaghan. He said, "I am going to stick you with this--I am going to stick you with this shiv."

Callaghan picked up a chair to defend himself. When Appellant made no further move, Callaghan put down the chair and departed for his own room. The messman reported to the mate that Appellant had threatened another man with a knife. The mate and chief engineer proceeded to the messroom where they saw Appellant who appeared to them to be intoxicated. They saw no knife, but heard Appellant say, "I am going to get this shiv in him."

The mate reported to the master who immediately proceeded toward the messroom. In a passageway he encountered Appellant with the open knife in his hand. Appellant said, "Keep out of this, Captain." The master struck Appellant in the throat and pinned him against the bulkhead, knocking the knife from his hand. The knife was retrieved by the chief engineer and given later to the master.

Putting Appellant in the custody of the chief mate, the master went to search Appellant's quarters where he found, alongside Appellant's bunk, a half empty bottle of Japanese whiskey which he confiscated.

About half an hour later Appellant came to the master's office. He saluted the master and gave him a carton containing a full bottle of whiskey, saying, "I am turning this in to you, which you overlooked."

Appellant had no duties on the next two days, Saturday and Sunday. He failed to work on the next two working days. On the third such he finally turned to after 1:00 p.m., declaring that he

would not disobey a direct order of the master.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is urged that:

- (1) The evidence is insufficient to support the findings.
- (2) The Examiner failed to find upon or consider material evidence presented on behalf of the Appellant.
- (3) The suspension order is excessive.
- (4) There are clear errors in the record.

No supporting brief has been filed, but there has been transmitted an argument, in the form of a letter, submitted to the Examiner prior to his decision in this case. This letter analyzes the testimony of Appellant, Callaghan, and the master. It points out discrepancies between Appellant's and Callaghan's versions of the incident. It calls attention to an apparent contradiction in Callaghan's testimony about the number of people in the messroom at the time.

It is urged that if Appellant did anything it was in self-defense. As to the master's testimony, it is asserted that he could not have seen a knife in Appellant's hand.

On the wrongful possession of liquor it is argued that there is no proof that the opened bottle belonged to Appellant.

As to the failure to work, the contention is that the evidence shows that because of the rough treatment Appellant received from the master he was physically incapacitated.

The letter closes with the statement that it appears that Appellant had no prior record of misconduct.

APPEARANCE: L. Charles Gay, Esquire of San Francisco, California.

OPINION

Since the questions raised by the letter deal with matters of fact they have all been resolved by the Examiner in his findings. On review the only question remaining is whether the findings are supported by substantial evidence.

The most important question is whether Appellant had a knife

and made the threat without provocation. Testimony of other persons in the messroom would have been desirable, but the testimony of the master that Appellant was armed immediately after the messroom encounter corroborates the testimony of the victim and provides substantial evidence to support the examiner's findings.

Counsel argues, "The charge is that schwenk threatened Callaghan with a knife. If Schwenk ever made such a threat it probably was coupled with the statement 'it you attack me I will stick you with this knife.'" In view of Appellant's unqualified denial that he had a knife, the fact that this speculative theory can be advanced in argument is indicative that substantial evidence was present to support a finding adverse to Appellant.

As to the wrongful possession of liquor there is uncontested evidence that Appellant surrendered a bottle to the master. This is enough to support the specification. However, as to the opened bottle, although it could possibly have belonged to another person in the room, the circumstances of its location at Appellant's bunk and his appearance of recent drinking could lead to an initial inference that it was probably his. The statement made after its confiscation, on the surrender of the unopened bottle--"I am turning this in to you, which you overlooked"--supports the inference and provides substantial evidence for the finding.

The failure to work is defended on the grounds that Appellant was physically disabled. But on the third day, after Appellant had again refused to work in the morning for this asserted reason, he turned to in the afternoon on the master's order, with no apparent change of condition or incapacity. This is enough to support the Examiner's findings.

The order, it is said, is excessive, and Appellant's record is referred to as being clear. At the time the argument was made counsel was apparently not completely informed. The order of the examiner was predicated upon a knowledge of three prior hearings at which charges involving disturbances aboard ship, insubordinate conduct in the presence of passengers, and a threat of bodily harm to a staff officer were found proved. This last had resulted in an order of two months' suspension or nine months' probation from 25 January 1963. Finding the acts in the instant case violative of this probation the Examiner, in his decision of 28 February 1964, invoked the two months' suspension and added six more.

What the examiner did not know was that in May 1963 another examiner had found that Appellant had violated that probation by threatening to disrupt the operating machinery of a vessel. In this order he invoked the two months' suspension, added one more month outright, and placed another three months' suspension on

twelve months' probation. There is no record that the decision of May 1963 was served on Appellant until November 1963, one month after the hearing in the instant case, but three months before the decision.

I must say that considering Appellant's record of unruly conduct over a period of seven years a suspension of eight months for the present offenses is not excessive. With three hearings in ten months for offenses of the type described, a glance at the table in 46 CFR 137.20-165 will quickly reveal the sort of order which could be sustained as appropriate.

It is unfortunate that service of the decision in the May 1963 case was not timely made on Appellant. On the state of the record I must find that on the date of decision in the instant case Appellant had already served two months' suspension by virtue of its incorporation into the order effected in November 1963. Similarly, the probation order in the May 1963 case did not begin to run until February 1964, and thus has no bearing on the instant case.

Reluctantly, then, I must reduce an order not considered excessive, since it expressly incorporates a period of suspension already served.

ORDER

The order of the Examiner dated at San Francisco on 28 February 1964 is MODIFIED to provide for six months' outright suspension and, as modified, is AFFIRMED.

W. D. Shields
Vice Admiral, United States Coast Guard
Acting Commandant

Signed at Washington, D. C., this 7th day of August 1964.